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IN THE

Supreme Court of the United States

GARRICK BECK AND JOAN KALB,

Petitioners

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

REED LEE
Counsel of Record
J. D. Obenberger & Associates
Three First National Plaza
70 West Madison Street
Suite 3700
Chicago, Illinois 60602
(312) 558-6427

Counsel for Petitioners

91 pp

QUESTIONS PRESENTED

The United States Department of Agriculture has promulgated regulations requiring that persons such as the Petitioners obtain prior written authorization before they gather with more than 73 other persons in the National Forests to pray and exchange and espouse their views.

1. Whether the challenged regulations impose unconstitutional time, place, and manner restrictions on expression because the authorization signature requirement, which imposes an undefined "group liability," is substantially more burdensome than necessary to achieve any legitimate governmental objective?

2. Whether the challenged regulations impose an unconstitutional prior restraint upon expression because, in a number of subtle ways, they leave Forest Service officials with impermissibly broad substantive and procedural discretion in determining whether and how to permit expression?

3. Whether the challenged regulations impose an unconstitutional prior restraint upon expression because they fail to provide for prompt judicial review, as the First Amendment requires following the denial of, or imposition of conditions upon, a license necessary for expression?

PARTIES TO THE PROCEEDING

The Petitioners, Garrick Beck and Joan Kalb, were the Appellants before the United States Court of Appeals for the Third Circuit and were Defendants in the United States District Court for the Western District of Pennsylvania. A third Defendant and Appellant below, Steven Sedlacko, proceeding *in forma pauperis*, has filed a separate petition for a writ of certiorari, docket no. 00-8512, and, for that reason, he is not a party to this Petition. While the courts below entered separate judgments for Beck, Kalb, and Sedlacko, *cf.* App. 1a, 20a, they had each consolidated the cases for litigation and disposition.

The United States of America was the sole Appellee before the United States Court of Appeals for the Third Circuit, and it prosecuted the Defendants in the United States District Court for the Western District of Pennsylvania.

CORPORATE DISCLOSURE STATEMENT

No party to this Petition is a corporation. *Cf.* Rule 29.6

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NOW COME the Petitioners, Garrick Beck and Joan Kalb, and respectfully request that this Court issue a writ of certiorari directed to the United States Court of Appeals for the Third Circuit in order to review the opinion and judgment of that court affirming the Petitioners' convictions for gathering on National Forest land to speak and pray without prior special use authorization to do so.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 234 F.3d 827 (3rd Cir. 2000) and is reproduced at Appendix A of this Petition. App. 1a. That court's judgments were entered on December 12, 2000, the same day as its opinion, so they are not reproduced in the Appendix. Rule 14.1(i)(iv). The opinion of the United States District Court for the Western District of Pennsylvania is reported at 86 F. Supp. 2d 509 (W.D. Pa. 2000), and is reproduced as Appendix B of this Petition. App. 20a.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered its judgments below on December 12, 2000. None of the parties filed any petition for rehearing below. This Court has jurisdiction over this Petition pursuant to Section 1254(1) of Title 28 of the United States Code.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The text of the First Amendment to the United States Constitution appears in Appendix C1 of this Petition. App. 42a. The text of Section 551 of Title 16 of the United States Code, authorizing certain administrative regulations governing the use of the National Forests is reproduced in Appendix C2. App 42a. The relevant portions of the Department of Agriculture's administrative regulations concerning "special use authorizations" for "noncommercial group uses" in the National Forests appear in Appendix C3. App. 43a.

STATEMENT OF THE CASE

The Petitioners, Garrick Beck and Joan Kalb,[1] were convicted in the United States District Court for the Western District of Pennsylvania of violating an administrative regulation codified at Section 261.10(k) of Title 36 of the Code of Federal Regulations. App. 20a, 37a. Promulgated by the Department of Agriculture,[2] this Section

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[1] As noted at ii, *supra*, Steven Sedlacko was also a co-defendant below, and he has a separate certiorari petition pending.

[2] The Department of Agriculture exercises statutory jurisdiction over the National Forest System, and the Forest Service is an administrative agency within that Department. *See, e.g.*, 16 U.S.C. § 551 (1988).

makes it a misdemeanor to use National Forest System lands without special use authorization where such authorization is elsewhere required by law. App. 2a. Other Department of Agriculture regulations expressly require prior, written special use authorization for expressive gatherings on National Forest System lands when the total number of participants and spectators at those gatherings exceeds 74 persons. 36 C.F.R. §§ 251.50, 251.51 (2000); App. 43a-44a.[3] Pursuant to a supporting statute, 16 U.S.C. 551 (1988), the Petitioners were each sentenced to a three-month term of imprisonment, directed to pay a special assessment, and fined $500.00. App 4a.

When the Department of Agriculture promulgated this requirement, governing so-called "non-commercial group uses" of the National Forests, it was fully aware that it regulated prospective activities on National Forest System lands which are presumptively protected by the First Amendment to the United States Constitution. *See* 60 Fed. Reg. 45,257-95 (August 30, 1995)(assessing final rule under, *inter alia*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) and *Thomas v. Review Board*, 450 U.S. 707 (1981)).[4] Indeed, the specific substantive requirements under which the Petitioners were convicted below replaced

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[3] As the Court of Appeals recognized below, App. 3a n. 2, a non-substantive recodification changed the numbering of some of the relevant regulations in late 1998. 63 Fed. Reg. 65949-69 (Nov. 30, 1998). This Petition continues the lower courts' use of the section numbers which were in effect when the current regulatory language was promulgated, although Appendix C also specifies the current section numbers, where different, in brackets.

[4] The United States has never seriously disputed that the National Forest System lands on which rainbow gatherings occur constitute a public forum for expression. *Cf. United States v. Rainbow Family*, 695 F. Supp. 294, 308-309 (E.D. Tex. 1988); 60 Fed. Reg. 45,262 ("noncommercial group use is an appropriate use of National Forest System lands and exercise of First Amendment rights is extremely important . . ..").

prior administrative regulations which had been invalidated as unconstitutional prior restrains upon expressive gatherings identical to the one which gave rise to this litigation. *See United States v. Rainbow Family*, 695 F. Supp. 294, 309-12 (E.D. Tex. 1988); *Id.* 695 F. Supp. 315, 322, 332 (E.D. Tex. 1988); *see also* 60 Fed. Reg. 45,258-59, 45,260-89 (commenting on prior litigation and extensively discussing "Rainbow Family Gatherings" held on National Forest System lands).

As both the Department of Agriculture and the lower federal courts recognize, the "Rainbow Family of Living Light," *cf.* App. 21a, regularly gathers on remote and undeveloped National Forest System land "to pray for peace, discuss environmental and other contemporary political and social issues, and exchange, develop, express, and demonstrate [the] ideas and views" of those who gather. App. 3a n. 1; 21a, *quoting Black v. Arthur*, 18 F. Supp. 2d 1127, 1130 (D. Ore. 1998), *aff'd* 201 F.3d 1120 (9th Cir. 1999); *see also United States v. Johnson*, 159 F.3d 892, 895 (4th Cir. 1998). This use of undeveloped National Forest System land reflects the gatherers' concern for the environment, their reverence for the "cathedral of nature," their commitment to lands held in trust for the public, and their determination to demonstrate the success of communities which arise and actually operate on the basis of common consent. *Black v. Arthur*, 18 F. Supp. at 1130; *United States v. Rainbow Family*, 695 F. Supp. at 299, 308; *Id.* at 322-23; 60 Fed. Reg. 45,260, 45,262. At least one such "national gathering" has occurred every year since 1972, and presently several regional gatherings occur throughout the United States each year. App. 21a.

The Petitioners were charged and convicted for attending the 1999 Annual Rainbow Gathering in Pennsylvania's Allegheny National Forest. App 22a. It is undisputed that more than 75 participants and spectators

were present at that gathering and that no one had obtained a prior special use authorization for that gathering. App. 21a, 28a-31a.

The Petitioners defended below on, *inter alia*, the grounds that the prior special use authorization requirement is facially invalid because it imposes an unconstitutional prior restraint upon their expression and religious worship. If more than 73 other persons gather for these purposes with any one of the Petitioners, the Forest Service will define that gathering as a "noncommercial group use" of National Forest lands. 36 C.F.R. § 251.51; App. 44a. The special use regulations then require that before any such use is made of National Forest System lands, a formal, written permit, known as an "authorization,"[5] must be obtained from the Forest Service. 36 C.F.R. § 251.50(a); App. 43a-44a. The Petitioners' prior restraint challenge is principally, though not entirely, directed to two features of the Forest Service's permit system.

First, while the challenged regulations do not require that an application for a group use authorization be signed by anyone, 36 C.F.R. § 251.54(e)(2)(i) [now § 251.54(d)(2)(i)]; App. 46a-47a,[6] they do require that the authorization

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[5] While this Petition will follow the regulation's use of the general term "special use authorization" (or "authorization" for short), the authorizations at issue here represent official permission required in advance of expression. For this reason, the Petitioners contend that they are the functional equivalent of the parade permits at issue in *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992),and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), and the motion picture licenses at issue in *Freedman v. Maryland*, 380 U.S. 51 (1965). The lower courts assessing the regulations at issue here have used the terms "authorization," "permit," and "license" interchangeably.

[6] Despite the absence of any regulatory language requiring it, the Forest Service has prepared application forms and insisted that they be signed as well. *See* App. 29a.

itself be signed by someone formally designated by the permit holder, *Id.* § 251.54(h)(1)(viii) [§ 251.54(g)(3)(ii)(H)]; App. 47a-48a, and they apparently contemplate, though they do not expressly require, that the signer must sign as an "agent for the group" which will use the authorization, *see, e.g.,* 60 Fed. Reg. 45274 (August 30, 1995)(final rule-making, response to comments). In any event, this special signature requirement is no accident, for the Forest Service and the courts below believe that presence of the applicant's signature on the authorization itself will impose upon the using "group" certain liabilities which would not otherwise exist under applicable law. *E.g.* App. 10a, *quoting United States v. Masel,* 54 F. Supp. 2d 903, 919 (W.D. Wis. 1999); 60 Fed. Reg. 45,274, 45,286. These liabilities arise, at least in part, from additional but unspecified terms and conditions[7] which Forest Service officials are left free to place upon the written authorization itself.

The second major prior restraint concern raised by the special use regulations focuses on the very limited provisions for judicial review of any denial of an authorization or of any burdensome terms or conditions which the Forest Service might attach to an issued authorization. With respect to an outright denial of a requested authorization, Section 151.54(h)(2) [§ 251.54(g)(3)(iii)]; App. 48a, expressly provides that "[a] denial of an application under paragraphs (h)(1)(i) through (h)(1)(viii) [(g)(3)(ii)(A) through

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[7] At the time the Petitioners were cited below, the regulations expressly provided, without further elaboration, that an issued authorization could contain such "terms and conditions as the [issuing] officer deems necessary to . . . (vii) otherwise protect the public interest." *See* App. 17a n. 9; 36a; *cf. U.S. v. Linick,* 195 F.3d 538, 541 n. 3 (9th Cir. 1999). After the Petitioners in this case were cited, App. 36a, the Department of Agriculture promulgated an interpretive rule restricting bases upon which conditions may be attached to authorizations. *Id.* at 542; 64 Fed. Reg. 48,959 (September 9, 1999).

(g)(3)(ii)(H)] of this section constitutes final agency action and is immediately subject to judicial review."[8] Although the regulations are silent concerning judicial review of a dispute over conditions attached to an issued authorization, the court of appeals below read the regulations to allow for similar action by a disappointed applicant. App. 18a. Thus, these regulations effectively place the burden of seeking any judicial review upon the applicant, rather than upon the Forest Service, and they remain altogether silent about the proceedings on review.

The courts below rejected the Petitioners' prior restraint challenges to the special use authorization regulations for a number of reasons. In particular, the Court of Appeals concluded that, because the "special use authorization scheme in general and the terms and conditions provision in particular," App. 14a, apply to both expressive and other special uses of National Forest System land, they are "closer to a law of general application," App. 14a, *quoting United States v. Masel*, 54 F. Supp. 2d 903, 914 (W.D. Wis. 1999), than to a prior restraint system. For this reason, it concluded that "[t]he terms and conditions provision does not permit the Forest Service to ban disfavored speech." App. 14a.

> Although we acknowledge that there is some theoretical possibility that the terms and conditions provision could be invoked to chill protected speech, we are not persuaded that "[t]he risk that Forest Service officials will use nefariously any discretion afforded to them by the . . . provision is . . . great enough to justify invoking [prior restraint scrutiny]" [*Masel*] at 914.

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[8] Similarly, Section 251.60(a)(1)(ii); App. 49a, provides that the revocation or suspension of an issued authorization is final administrative action subject to immediate judicial review.

App. 14a-15a (internal quote and citation omitted). The Court of Appeals also concluded that the "terms and conditions provision" could survive prior restraint scrutiny because the provision contemplated the imposition of terms and conditions which furthered only nonexpression-related government interests. App. 15a-17a.

For these reasons, the Court of Appeals affirmed the Petitioners' convictions. The trial court has stayed all aspects of the Petitioners' sentence – including the three months' period of incarceration – pending completion of appellate review.

REASONS FOR GRANTING THE PETITION

I. When Faced with a Regulation Requiring Official Permission in Advance of Expression, the Circuits Are Divided Over When to Apply Prior Restraint Scrutiny and Over the Constraints Which the First Amendment Imposes Upon Systems of Prior Restraint.

The administrative regulations under which the Petitioners were convicted below require prior, written official approval before groups of 75 or more persons may gather on National Forest System land to pray or to express and exchange their views. 36 C.F.R. §§ 251.50, 251.51 (2000); App. 43a-44a. In this sense, the regulations impose a literal prior restraint upon expression. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). In this sense, too, the challenged regulations are similar to parade permit ordinances, *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), park permit ordinances, *Niemotko v. Maryland*, 340 U.S. 268 (1951), regulations requiring prior authorization before using public sidewalks or plazas for charitable, religious, or political canvassing, *Riley v. National Federation of Blind*, 487 U.S. 781 (1988),

rules requiring approval of a government agency prior to the use of a performance space which it operates, *Southeastern Promotions*, 420 U.S. 546, and statutes requiring motion picture licensing, *Freedman v. Maryland*, 380 U.S. 51 (1965). This Court has long recognized that the First Amendment imposes special constraints on all such regulations in order to ensure that licensing officials will not manipulate the prior approval requirement to accomplish indirectly what they cannot constitutionally accomplish directly. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-62 (1988).

As detailed at 10-12, *infra*, the lower courts are divided on when to apply the constitutional tests which this Court has articulated for prior restraints; and, under those tests, they differ about how much and what kind of substantive and procedural discretion can be left in the hands of an official or agency which issues licenses necessary for expression. The lower courts have also come to different conclusions, as detailed at 13-21, *infra*, concerning the First Amendment's requirements governing judicial review in the event that a licensor's decision disappoints an applicant who seeks to speak. The United States Court of Appeals for the Third Circuit resolved each of these issues below, as noted at 7-8, *supra*, often deliberately departing from the resolution previously reached by a sister circuit. As argued at 21-29, *infra*, the Third Circuit's conclusions on these important matters also conflict with the relevant decisions of this Court. For all of these reasons, this case presents this Court with a particularly good opportunity to resolve important current questions surrounding prior restraints. Under Rule 10(a) and (c), then, this case warrants the exercise of this Court's powers of discretionary review.

A. The Circuit Courts of Appeals Are Divided Over When to Apply the Prior Restraint Scrutiny Articulated by this Court.

In *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), this Court invalidated a municipal ordinance requiring prior official permission for the placement of newsracks on the public sidewalks. The ordinance left the Mayor with unbridled discretion to grant or deny such permission, *Id.* at 769, 771, and to place conditions on the use of such newsracks as were allowed, *Id.* at 769. Following a long line of prior decisions, this Court held that the ordinance imposed an unconstitutional prior restraint upon expression. *Id.* at 772. This Court thus recognized that where the government requires prior case-by-case permission for "expression or [for] conduct commonly associated with expression," *Id.* at 759, the dangers of abuse require that the licensor's discretion be carefully constrained in advance, *Id.* 755-59. At the same time, this Court recognized that "laws of general application" not aimed at expression or related conduct and not permitting evaluation of the content of on-going or future expression do not impose presumptively invalid prior restraints. *Id.* at 760-61.

Under *Lakewood*, the Ninth Circuit – properly in the Petitioners' view – has evaluated the challenged noncommercial group use regulations as prior restraints on expression or on conduct commonly associated with expression, and it has accepted or imposed narrowing constructions on those regulations in order to avoid their invalidation as such. In *United States v. Linick*, 195 F.3d 538 (9th Cir. 1999), for instance, the Ninth Circuit accepted a narrowing construction contained in an interpretive regulation, *see* 64 Fed. Reg. 48,959 (September 9, 1999), as restricting the bases upon which the Forest Service can impose conditions on an authorization issued for a noncom-

mercial group use of National Forest land. *Id.* at 542-43. Similarly, in *Black v. Arthur*, 201 F.3d 1120 (9th Cir. 2000), that court additionally interpreted the challenged regulations to strictly limit the liability which might arise from a violation of any conditions so imposed. *Id.* at 1123-24. Each of the *Black* court's interpretations substantially reduced the Forest Service's ability to chill presumptively protected expression, *Id.* at 1123, and each such narrowing construction was predicated upon an express concession which the United States made at oral argument in that case, *Id.* at 1123-24.

In this case, the Third Circuit sharply rejected the Ninth Circuit's approach to the challenged regulations. App. 15a, 17a n. 9. Indeed, this rejection was critical to the outcome below, because, as the trial court had recognized, the interpretive regulation was not promulgated until after the Petitioners had been cited in this case. App. 36a. If the regulations imposed an unconstitutional prior restraint without that interpretive regulation, then this Court's decision in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153-58 (1969)(invalidating conviction for unlicensed protest march where narrowing construction was imposed upon permit requirement *after* the march had occurred), would thus require reversal of the convictions and sentences at issue here.

Nevertheless, both of the courts below deliberately rejected the argument that the challenged regulations are subject to prior restraint scrutiny. App. 15a, 37a. Following, *United States v. Masel*, 54 F. Supp. 2d 903, 914 (W.D. Wis. 1999), the Third Circuit concluded that the challenged "special use authorization scheme" is "closer to a law of general application," than to a prior restraint system. App. 14a. To be sure, many "special uses" of National Forest System land have nothing to do with expression. *Cf.* 36 C.F.R. § 251.50; App. 43a. But the regulations at issue here

carefully single out "noncommercial group uses" for special consideration, 36 C.F.R. § 251.54 – undoubtedly because the government knows full well that *this* subcategory of special uses is, in fact, dominated by "expression or conduct commonly associated with expression." *See, e.g.*, 60 Fed. Reg. 45,257-89 (evaluating final rule under First Amendment standards and almost exclusively discussing expressive "noncommercial group uses"). Indeed, the very definition's use of the term "participants or spectators," 36 C.F.R. § 251.51; App. 44a, expressly contemplates expressive activity. At least where, as here, there has been no showing that a substantial number of nonexpressive uses will provided a "yardstick," *cf. Lakewood*, at 761, against which to measure the licensor's treatment of expressive ones, the courts should treat a prior permission requirement so plainly crafted with expression in mind as a prior restraint rather than as a law of general application.[9]

This case thus presents this Court with an opportunity to clarify for the lower courts when a prior license requirement should be treated as a prior restraint even though it may require licensing of some nonexpressive as well as expressive activities. *Cf. FW/PBS v. City of Dallas*, 493 U.S. 215, 224 (1990)(invalidating licensing system as prior restraint even though it applied to some nonexpressive uses because it "largely targets" expressive ones).

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[9] A similar situation arises when courts are called upon to evaluate "amusement" licensing ordinances, which typically include both expressive and nonexpressive, participatory amusements within their scope. *See, e.g., Admiral Theatre v. City of Chicago*, 832 F. Supp. 1195, 1202 (N.D. Ill. 1993)(reviewing "public place of amusement" license ordinance as prior restraint on expression).

B. The Circuit Courts of Appeals Are Divided Over the First Amendment's Requirements for Judicial Review Following the Denial of a License Necessary for Expression. This Court Had Granted Certiorari to Resolve this Conflict in a Case that Was Ultimately Dismissed as Moot Earlier This Term.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court invalidated a statute that required motion picture exhibitors to obtain a prior license from a review board for each film shown in the state. This Court held that whenever the government imposes a prior restraint upon free expression – such as a license or permit requirement – that scheme must contain three procedural safeguards. The last of these safeguards requires prompt judicial review if a license is denied. *Id.* at 59; *see also, FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990)(plurality opinion) ("there must be the possibility of prompt judicial review in the event that the license is erroneously denied"); *accord Id.* at 238 (Brennan, J., joined by Marshall and Blackmun, JJ., concurring in judgment).

1. This Court must determine what constitutes prompt judicial review.

In *Freedman*, this Court made it clear that the term "prompt judicial review" means more than mere prompt access to the judicial system:

> Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's

> view that the film is unprotected, may have a discouraging effect on the exhibitor. *See Bantam Books, Inc. v. Sullivan,* [372 U.S. 58 (1963)]. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Freedman, at 59.

Several of the circuits have departed from this articulation of the requirement of prompt judicial review. Even in cases, such as this one, involving core political and religious expression, these circuits no longer require that a system of prior restraint provide for a prompt judicial disposition of a challenge to a denial of a license necessary for expression. Instead, these circuits require only that the applicable general law provide for prompt access to a reviewing court, as by a proceeding for a common law writ of certiorari. Other circuits, however, have recognized – properly in the Petitioners' view – that the First Amendment requires more than mere access to the courts: when an administrative official or agency denies a license necessary for expression and a disappointed applicant seeks judicial review, the law must provide for prompt judicial action.

As this Court recognized in *City News & Novelty, Inc. v. City of Waukesha,* 69 U.S.L.W. 4081, 4082 (January 17, 2001)(dismissed as moot), a serious split has now developed among the circuits concerning just what the First Amendment requires of prompt judicial review in the context of a prior restraint upon expression. Only this Court can resolve that split.

One side of the conflict is exemplified by *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993)(en banc), *cert. denied,* 511 U.S. 1085 (1994). The plurality opinion in that case

concluded that the First Amendment and *Freedman* require no more than that a speech-licensing system allow, by operation of general law, for prompt access to a reviewing court. *Id.* at 1324-25. Five judges, however, disagreed with the five-member plurality on this point, *Id.* at 1330-31 (Flaum, J., joined by Cudahy, J., concurring in judgment), 1340-41 (Cummings, J., joined by Bauer and Fairchild, JJ., dissenting), and two judges expressed no opinion, *Id.* at 1333-35 (Ripple, J., joined by Rovner, J., concurring in judgment). There was thus no holding on this point. Nevertheless, a later Seventh Circuit panel understood *Graff* to hold that "[t]he opportunity to apply for . . . [a common law] writ [of certiorari] is enough . . . even when rights under the first amendment are at stake." *River Park, Inc. v. City of Highland Park*, 23 F. 3d 164, 167 (7th Cir. 1994). *See also Thomas v. Chicago Park District*, 227 F.3d 921, 927-28 (7th Cir. 2000).

The First and Fifth Circuits join the Seventh in holding that the First Amendment merely requires an opportunity for prompt access to a reviewing court following an administrative denial of a license necessary for expression, *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1070-71 (5th Cir. 1994)(per curiam), although the Fifth Circuit has expressed some ambivalence, *TK's Video*, at 709:

> Despite contrary suggestions in Justice Brennan's opinion in *FW/PBS, Inc.* and some uncertainty in the language of Justice O'Connor's opinion in the same case, we read the Supreme Court to insist that the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period.

On the other hand, the *Graff* plurality's suggestion concerning prompt judicial review has been deliberately rejected in other circuits. It was quickly criticized by a majority opinion of another circuit sitting en banc. In *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 994 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1010 (1995), the Fourth Circuit expressly held that a prompt judicial determination is required. Similarly, in *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir. 1995), the Sixth Circuit also rejected the argument that mere access to judicial review satisfies the requirement of prompt judicial review. While observing that "the Supreme Court has not expressly defined prompt judicial review," the Sixth Circuit recognized that even if judicial access were immediate in that case, "a permit applicant would still have to wait three to five months for judicial review," *Id.* at 225, and concluded that such a delay could not satisfy the prompt judicial review requirement. The Ninth Circuit has also rejected *Graff's* judicial review requirement as "meaningless" since one facing any kind infringement on protected speech already has immediate access to a judicial forum. *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998); *see also 4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999).[10]

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[10] The situation is unsettled in the Second and Eleventh Circuits. *Compare Beal v. Stern*, 184 F.3d 117, 129 (2nd Cir. 1999)(prompt access to courts by common law certiorari would satisfy the constitutional requirements), *with MacDonald v. Safir*, 206 F.3d 184, 195 (2nd Cir. 2000)(common law certiorari procedure might not satisfy prompt judicial review requirement if it does not mandate a prompt judicial decision); *compare Redner v. Dean*, 29 F.3d 1495, 1500-1501 (11th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995)(apparently rejecting the "prompt judicial access" position), *and Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761, 774-75 (11th Cir. 2000)(requiring prompt judicial decision for licenses involving core political expression), *with Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1255-57

In its decision below, the Third Circuit joined those circuits which hold that prompt access to a court is sufficient under the First Amendment. Assuming, in part of its opinion that prior restraint scrutiny is appropriate, App. 15a, it upheld the challenged regulations upon concluding that any administrative action adverse to the applicant – including the attachment of burdensome conditions to an issued authorization – amounts to final administrative action subject to immediate judicial review. App. 18a. But because the challenged regulations are altogether silent concerning how promptly matters must move once in court, the Third Circuit was content to leave applicants with prompt access, rather than the prompt judicial determination expressly required in *Freedman*.

This Court has long recognized the importance of judicial review in safeguarding those subject to a speech licensing system from predictable abuse. Especially now that *Waukesha* has been dismissed, this Court should grant the instant Petition and resolve the differences which have arisen concerning this critical element of prior restraint scrutiny.

2. This Court must also determine who bears the burden of initiating judicial review.

In *Freedman v. Maryland*, 380 U.S. 51 (1965), this Court made clear that a valid motion picture licensing scheme must assure exhibitors that the licensing official or agency "will, within a specified brief period of time, either issue a license or go to court to restrain showing the film." *Id.* at 59. In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court effectively relaxed one of these specific requirements in the context of a licensing scheme under

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(11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000)(prompt access sufficient at least for adult business licensing ordinances).

which entire businesses were licensed.[11] Distinguishing *Freedman*, which involved licensing for individual motion pictures, the *FW/PBS* plurality noted that "[b]ecause the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court." *Id.* at 229-30 (plurality opinion); *accord Id.* at 244 (White, J. and Rehnquist, C.J., concurring in relevant part). For this reason, this Court held that the government need not bear the burden of going to court when it denies a license which is required for the operation of an entire business.

In the wake of *FW/PBS*, the circuits are divided over whether the government must bear the burden of going to court after a denial of a permit for a single expressive event such as a single protest march or, in this case, one of the several gatherings which are conducted in different National Forests throughout a typical year, *cf.* App. 21a.

In a case involving a permit required for a single political event, for instance, the Eleventh Circuit recognized and applied, properly in the Petitioners' view, the foregoing *Freedman-FW/PBS* distinction:

> In the case before us, the censored party lacks the business incentive to pursue review through the courts, and the speech at issue is core political speech in a public forum. . . . The right to speak sought by CAN in this instance deserves greater protection than that outlined [for adult businesses] by the plurality in *FW/PBS*. Accordingly, we decline to

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[11] Actually, *FW/PBS* relieved the government of two burdens under the circumstances of that case: 1) the burden of initiating judicial review, for the reason described in text immediately *infra*, and 2) the burden of justifying its adverse licensing decision once in court, for the reasons described at 20, *infra*.

> relieve the City of the requirement that its Street Closing Ordinance meet *Freedman's* first procedural safeguard.

Cannabis Action Network, Inc. v. City of Gainesville, 231 F.3d 761, 776 (11th Cir. *2000*).

Yet in a case presenting very similar facts, the Seventh Circuit expressly left it to a disappointed permit applicant to initiate and pursue judicial review:

> If a person denied a permit for reasons that he believes violate the First Amendment is dissatisfied with a paper record reviewed in state court by means of common law certiorari, he has only to bring a suit in federal district court and if the matter is urgent to seek . . . a preliminary injunction.

Thomas v. Chicago Park District, 227 F.3d 921, 927 (7th Cir. 2000). In so holding, the Seventh Circuit was motivated by its belief that *Freedman* "requires only that the government may not regulate the content of speech without judicial authorization and so does not extend to time, place, and manner licensing systems." *Id.* at 926, *citing FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228-230 (1990)(plurality opinion); *Id.* at 244 (White, J., joined by Rehnquist, C.J., concurring in part and dissenting in part); *Id.* at 249 (Stevens, J., concurring in part and dissenting).

Yet the outcome of *FW/PBS* would have been entirely different under the Seventh Circuit's reasoning.[12] In that

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[12] Indeed, only two Justices in *FW/PBS* subscribed to the Seventh Circuit's present position, *FW/BBS* at 244 (White, J., joined by Rehnquist, C.J.), and they expressly *dissented* from the portion of the plurality opinion which discussed and applied *Freedman* to the licensing scheme then before this Court. *Id.* at 249.

case, this Court expressly recognized that the licensing system at issue did *not* permit government control over the content of the licensed expression, *Id.* at 229 ("the City reviews the general qualifications of each applicant, a ministerial action that is not presumptively invalid"), but it nevertheless invalidated the system as an unconstitutional prior restraint in part because it lacked sufficient provisions for judicial review, *Id.* 229 ("Dallas scheme . . . also fails to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of license denial"). To be sure, the limited nature of the licensor's inquiry in that case relieved the government of the burden of justifying an adverse licensing decision in court, but *it* did not dispense with the need for the government to go to court in the event of a license denial. *Cf. supra*, at 18. Even if a speech licensing system is established merely to implement time, place, and manner concerns, it must pass constitutional muster as a prior restraint. *See generally Id.* at 223 ("Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue . . . whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction"); *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

In this case, too, the Third Circuit left the burden of initiating judicial review on the applicant. App. 18a (upholding challenged regulations upon finding that any adverse administrative decision is subject to immediate judicial review). But unlike the adult businesses involved in *FW/PBS*, those who attend – and even those who take an active role in supporting – gatherings of the sort these Petitioners attend are unlikely to have a strong incentive to seek judicial review of an adverse authorization decision concerning any *particular* gathering. In the first place, as the government concedes in the title of the challenged regulations, these gatherings are "*non*commercial group

uses" (emphasis added), so any economic motive present in *FW/PBS* is absent here. Secondly, the trial court expressly found that not one but several "Rainbow Gatherings" are held across the United States in any given year. App. 21a (referring to "regional" gatherings). Much like an exhibiter considering presenting a particular motion picture, *cf. Freedman* at 59, then, those who would take an active role in supporting a gathering at a particular location might be tempted to forego a challenge to an adverse authorization decision and simply gather in another National Forest elsewhere in the country. Under such circumstances, though, potential attendees who can travel only limited distances to these gatherings would be deprived of the ability to share in the religious communion and the exchange of ideas which a more local gathering would offer them.

This case thus presents this Court with an opportunity to clarify for the lower courts just when licensing officials, as opposed to disappointed license applicants are required to "go to court" to enforce a denial of a license necessary for speech.

II. The First Amendment Prohibits the Enforcement of the Forest Service's Noncommercial Group Use Regulations Against the Expressive and Religious Gatherings Which the Plaintiffs Attend.

The United States attempts to justify the challenged regulations as mere time, place, and manner regulations on expression. Indeed, the government must show, *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994), these regulations pass constitutional muster as such by establishing that they "are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternate channels of communication." *United States v. Grace*, 461 U.S. 171, 177

(1983). Beyond this, when, as here, the government implements time, place, and manner concerns by imposing a prior case-by-case permission requirement on expression, it must additionally justify the arrangement as a prior restraint. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). This requires that the government rebut the "heavy presumption" against the constitutionality of such restraints, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975), by establishing that the challenged regulations narrowly constrain the substantive discretion placed in the hands of licensing officials with "narrow, objective, and definite standards," *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969), and that tight procedural requirements constrain the processing of any requests for such permission, *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965).

For the reasons outlined *infra*, the United States cannot justify the challenged regulations either as time, place, and manner regulations or as prior restraints on the expression of the Petitioners and those with whom they gather to pray and express and exchange their views and ideas. For this reason, the Petitioners' convictions and sentences cannot stand.

A. The Challenged Regulations Cannot Stand as Time, Place, and Manner Restrictions Because the Authorization Signature Requirement Is Substantially More Burdensome than Necessary to Achieve Any Legitimate Governmental Objective.

The requirement that at least one "agent for the group," 60 Fed. Reg. 45,274 (August 30, 1995), actually sign the authorization itself, 36 C.F.R. § 251.54(h)(1)(viii) [§ 251.54 (g)(3)(ii)(H)]; App. 47a-48a – as opposed to an application for that authorization, 36 C.F.R. § 251.54(e)(2)(i) [§ 251.54

(d)(2) (i)]; App. 46a-47a – fails as a mere time, place, and manner regulation of expression because it is not narrowly tailored to serve any legitimate governmental interest. *Cf. United States v. Grace*, 461 U.S. 171, 177 (1983). While the "narrow tailoring" requirement does not demand that the government choose the least restrictive means of achieving its objectives, it does prohibit the government from "burden[ing] substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1988).

The challenged authorization signature requirement is indeed substantially more burdensome than necessary to serve any legitimate interest of the United States. Any concern about maintaining official contact with particular individuals throughout the application process, for instance, can be satisfied by requiring that a contact person be identified on the application. Similarly, any interest in combating fraud in connection with an application could be implemented by requiring verification of the *application*, since this is, after all, where the applicant provides potentially critical information to the government. The *authorization* signature requirement, though, is uniquely justified, as the court below expressly recognized, App. 10a, because the signature of the group's agent on the authorization it imposes upon the using "group" certain liabilities which would not otherwise exist under applicable law, *see* 60 Fed. Reg. 45,274, 45,286, in particular, liabilities which arise from the conditions which the Forest Service is left free to place upon the written authorization itself.

The challenged regulations, however, leave the nature and extent of this liability altogether undefined; and *this* is precisely why the application signature requirement is substantially more burdensome than a prior restraint system which does not require the user's signature on the authorization itself. This Court has long recognized that,

because of the chilling effect which vicarious liability can have on expression and expressive association, the First Amendment imposes strict limitations on the government's ability to hold an individual or group liable for the wrongs which another might commit in the course of an expressive association. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *DeJonge v. Oregon*, 299 U.S. 353 (1937). Yet this is precisely why the government demands a holder's agent's signature on the authorization itself. But in light of the undefined nature of this liability in general[13] and Forest Service's ability to vary specific conditions on a case-by case basis, the authorization signature requirement falls far short of the "precision of regulation" which this Court has demanded where issues of group liability arise in the context of presumptive protected expression. *Cf. Claiborne Hardware* at 916. Even as a time, place, and manner regulation, then, the authorization signature requirement must fall.

B. The Challenged Regulations Impose an Invalid Prior Restraint Because, in a Number of Subtle Ways, they Leave Forest Service Officials with Impermissibly Broad Substantive and Procedural Discretion in Determining Whether and How to Permit Expression.

The challenged regulations also fail when analyzed as prior restraints upon expression. Indeed, the undefined nature of the authorization signature liability as well as the government's ability to vary, from case to case, the conditions giving rise to that liability, *see supra* at 22-24,

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[13] In view of its rejection of the Ninth Circuit's approach to these regulations, App. 15, 17 n. 9, the Third Circuit made no effort below to narrowly construe the scope of this liability *cf. Black v. Arthur*, 201 F.3d 1120, 1123 (9th Cir. 2000)(limiting "group liability" to permit revocation), and even if it had, that narrowing construction would have come too late to save the convictions at issue here.

pose insurmountable constitutional obstacles here given that prior restraint systems must be fettered by "narrow, objective, and definite" substantive standards. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). In other words, the government may not escape the appropriate constitutional scrutiny merely by playing a legislative or administrative game of 'hide the discretion.' Insufficiently fettered discretion in *either* the standards for evaluating applications *or* the conditions which may be placed upon issued licenses will doom a speech licensing system. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 772 (1988).

The authorization signature requirement is not the only place in which the government has subtly hidden the remaining discretion which the challenged regulations afford to Forest Service officials. In light of the constitutional requirement of prompt administrative action on applications for advance permission for expression, for instance, the challenged regulations require that Forest Service administrators evaluate a noncommercial group use application within 48 hours of its submission. 36 CFR § 251.54(f)(5) [§ 251.54(g)(3)(i)]; App. 47a. Indeed, the current regulations further provide that an authorization is automatically granted unless the authorized officer denies the application within the allotted time. *Ibid.* At first glance, this appears to guarantee sufficiently prompt administrative processing, but the regulation then subtly *undoes* this apparent guarantee by providing that, even if a Forest Service officer affirmatively grants an authorization within the allotted period, he or she may later *revoke* it for any reason which would have permitted denial in the first place. 36 CFR §§ 251.54(f)(5) [§ 251.54(g)(3)(i)], 251.60 (a)(1)(i); App. 47a, 49a. There is simply no point to a requirement that an official quickly decide whether to grant or deny an authorization if he or she can then spend the following days or weeks searching for a reason – which

could not be found within the allotted time – to deny, and therefore to revoke, an authorization. Indeed, such later revocation of an already issued authorization would effectively delay judicial review by delaying the adverse decision on an application.[14]

The Department of Agriculture promulgated the challenged regulations after previous permit requirements had been invalidated as unconstitutional prior restraints on the very sort of expressive gatherings at issue here. *See United States v. Rainbow Family*, 695 F. Supp. 294, 309-12 (E.D. Tex. 1988); *Id.* 695 F. Supp. 315, 322, 332 (E.D. Tex. 1988); *see also* 60 Fed. Reg. 45,258-59 (noting prior litigation). No doubt the government tried hard to shield these replacement regulations from the constitutional scrutiny which had proved fatal to earlier versions. But whether through inadvertence or an attempt at indirection, the government has failed to cure the constitutionally fatal deficiencies: insufficiently fettered substantive and procedural discretion remains, and the challenged regulations cannot stand.

C. The Challenged Regulations Impose an Invalid Prior Restraint Because they Fail To Provide for the Prompt Judicial Review Which the First Amendment Requires Following the Denial of a License Necessary for Expression.

In promulgating the challenged regulations, the government recognized that the First Amendment requires prompt judicial review of any adverse decision of its administrators concerning an application for a noncommercial group use authorization. It has thus expressly provided that a denial of an application for a special use authoriza-

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[14] In addition, such a revocation would cause very substantial logistical, safety, and other issues in the context of the large, remote gatherings which the Plaintiffs attend.

tion for a noncommercial group use is a final administrative action subject to immediate judicial review,[15] 36 C.F.R. § 151.54(h)(2) [§ 251.54(g)(3)(iii)]; App. 48a – *if*, but *only* if, the disappointed applicant undertakes to haul the government into court.

But that provision falls short of the clear constitutional requirement that regulation provide, expressly or by "authoritative judicial construction that the [licensor] will, within a specified brief period, either issue a license or go to court to restrain" the planned expression. *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). The requirement that the government bear the burden of initiating judicial review of any adverse administrative action on a license for expression is an important one, *see Riley v. National Federation of the Blind*, 487 U.S. 781, 802 (1988), because it ensures that one wishing to speak or worship will not be discouraged by an improper administrative denial and simply take his or her expression or worship elsewhere or try another time. *Freedman* at 59. That possibility is particularly likely in the context of the gatherings which the Petitioners attend since not one but several occur throughout the country in a given year. App. 21a (referring to "regional" gatherings). Persons who would otherwise be willing to take an active role in supporting a particular gathering might well be tempted to forego a challenge to an adverse authorization decision and simply gather in another National Forest elsewhere in the country. If that happened, however, potential attendees who can travel only limited distances to these gatherings would be deprived of the ability to share in the religious communion

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[15] As noted at 6-7, *supra*, the regulations also provide for immediate judicial review of a revocation, 36 C.F.R. § 251.60(a)(1)(ii); App. 49a, and the Third Circuit construed them below to provide for immediate judicial review of conditions which issuing officials may place upon a written authorization, App. 18a.

and the exchange of ideas which a nearby regional gathering would offer them.

Although there are circumstances under which the First Amendment does not require the licensor to bear the burden of initiating court action, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229 (1990), this is not one of them. *See supra* at 17-21. As noted, the gatherings at issue here occur several times and in several National Forests each year, App. 21a, so each such gathering is more akin to an individual motion picture, *Freedman* at 58-59, than to an entire business, *FW/PBS* at 229. The fact that the challenged regulations do not contemplate that Forest Service officials will consider the content of the proposed expression in evaluating an application may well affect *Freedman's* requirement that the government bear the burden of justification once in court, but the frequency of the gatherings, and the attendant danger that one might be abandoned in the face of an adverse administrative ruling requires that the government, not a disappointed applicant, bear the burden of bringing the matter before a court, just as in *Freedman*.

Finally, the challenged regulations are also deficient because they say nothing about the judicial review process itself. As noted at 13-14, *supra*, this Court has expressly required a prompt judicial decision when the applicable rules authorize the advance restraint of expression. *Freedman* at 59; *see also Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980)(invalidating prior restraint on expression in advance of final determination concerning obscenity). This failure leaves a disappointed applicant to the vicissitudes of the litigation process. For instance, the Forest Service might easily delay any answer to an applicant's complaint until the time for the planned event has passed and then move to dismiss the action as moot. In addition, the licensing officials could use the fact that they

will likely be in possession of the written materials relevant to judicial review to delay or render ineffectual emergency proceedings even assuming that a disappointed applicant would be sophisticated and motivated enough to seek a temporary restraining order or a preliminary injunction once a complaint has been filed. The failure of these regulations to require prompt action by Forest Service officials in furnishing a reviewing court with the administrative record, and the failure to provide that an administrative application denial will have no effect until approved by a judge provides yet another reason why the challenged regulations are unconstitutional and why the Petitioners' conviction for violating them cannot stand.

CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully request that this Court issue a writ of certiorari directed to the United States Court of Appeals for the Third Circuit to review the opinion and judgment of that court affirming the Petitioners' convictions for gathering on National Forest land to speak and pray without prior special use authorization to do so.

Respectfully submitted,

Reed Lee
Counsel of Record
J. D. Obenberger & Associates
Three First National Plaza
70 West Madison Street
Suite 3700
Chicago, Illinois 60602

(312) 558-6427

Counsel for Petitioners